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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re M.S., a Person Coming Under the Juvenile
Court Law.

MERCED CO. HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

L.H.,

Defendant and Appellant.

F057584

(Super. Ct. No. JV27857)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Merced County. Harry L. Jacobs, Commissioner.

Amy Z. Tobin, under appointment by the Court of Appeal, for Defendant and Appellant.

James N. Fincher, County Counsel, and James B. Tarhalla, Deputy County Counsel, for Plaintiff and Respondent.

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* Before Vartabedian, Acting P.J., Levy, J. and Kane, J.

L.H. (father) appeals from an order terminating his parental rights (Welf. & Inst. Code, § 366.26) to his daughter, M.¹ He contends the Merced County Superior Court (court) abused its discretion by denying his request (§ 388) for custody. He also joins in arguments raised by the child's mother in her appeal (*In re M.S.*; F057387). On review, we affirm.

PROCEDURAL AND FACTUAL HISTORY

In early July 2008, M., who was just weeks shy of her third birthday, was admitted to a hospital and diagnosed with cerebral edema, water intoxication and altered mental state. Her injuries were brought on by her mother's abusive and negligent conduct.

Father at the time was not involved in caring for M. and was considered her alleged father. He had been in prison since before M.'s birth and was only released in May 2008. He had not provided any financial support for M. and made no attempt to protect her. He claimed he had been trying to find the child's mother after his prison release.

The Merced County Human Services Agency (agency) took M. into protective custody at the hospital and initiated the underlying dependency proceedings. Given the serious nature of the harm M. suffered, the agency pursued not only the court's exercise of jurisdiction over M. and her removal from parental custody but also its denial of reunification services for both parents. In father's case, although the court eventually found him to be M.'s presumed father, the agency recommended the court deny him services pursuant to section 361.5, subdivision (b)(12), because he had been convicted of a violent felony, namely robbery.²

¹ All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

² Section 361.5, subdivision (b)(12), authorizes the juvenile court to deny reunification services to a parent convicted of a violent felony, as defined in Penal Code

At a contested hearing in December 2008, father testified about the circumstances which led to his 2003 robbery conviction. He further testified he learned he was M.'s father while in prison for a 2005 car theft conviction. He then wrote M. weekly and sent her pictures. Mother and the child once visited him in prison. He lost contact with M. approximately three weeks before he was released and had difficulty locating her once out of prison. He did not remember how he located M., but stated he visited her, brought her clothes and offered to provide money.

Father also testified he began working approximately a month after his release as a care provider for his sister's four children with whom he also lived. In addition, he participated in a weekly group for fathers, tested negative for drugs and had no parole violations. He stated he would do anything to reunify with M. Father's attorney urged the court to exercise its discretion and order reunification services for father notwithstanding his robbery conviction.

At the conclusion of the December 2008 hearing, the court exercised its dependency jurisdiction over M. and ordered her removed from the custody of both parents due to their failure to protect M. from serious harm. The court also denied both parents reunification services and reduced their visits with M. from once a week to once a month.

In father's case, the court acknowledged its discretion to order reunification services, despite father's robbery conviction, if there was clear and convincing evidence reunification would serve the child's best interest. (§ 361.5, subd. (c).) The court determined, however, there was no such clear and convincing evidence. The court found father had not been in M's life.

section 667.5, subdivision (c). A "violent felony" includes certain enumerated crimes including "[a]ny robbery." (Pen. Code, § 667.5, subd. (c)(9).)

The court's rulings led it to set a March 2009 section 366.26 hearing to select and implement a permanent plan for M. Father subsequently challenged, by way of writ petition, the court's order denying him reunification services. In our opinion denying father writ relief, we explained:

“where [section 361.5,] subdivision (b)(12) applies, the juvenile court is prohibited from ordering reunification services unless the court finds by clear and convincing evidence reunification would serve the child's best interest. (§ 361.5, subd. (c).) There is no evidence on this record to support such a finding. M. suffered severe abuse and cruelty at the hands of her mother and she had no relationship with [father,] who absented himself from her life by virtue of his criminal behavior. Given the extreme abuse M. has suffered, her best interest lies in a stable, nurturing home.” (*L.H. v. Superior Court*, (Jan. 30, 2009, F056578) [nonpub. opn.], p. 5.)

Shortly before the March 2009 section 366.26 hearing, father filed a request to change the court's order denying him reunification services and grant him custody. He alleged that since the court's denial of services, he pursued services on his own, had not violated his parole, was drug-free and employed, had housing, and had investigated schooling for M. He further alleged placing M. in his custody would be better for her because he previously had a relationship with her, he actively participated in the dependency proceedings, he visited with her once a week until the court ordered monthly visits and, since then, he visited her once a month.

In the meantime, the agency filed a report in which it recommended that the court find M. adoptable and terminate parental rights. The agency described M. as a healthy, three-year-old female toddler with no significant developmental delays. In addition, she had been placed, since early 2009, with caregivers who were committed to adopting her. According to the agency, M. had supervised, one-hour visits with the parents for a total of approximately 23 hours in seven months. Most of those visits occurred before the court set the section 366.26 hearing and reduced visits to once a month. The visits went well and M. was able to separate easily from the parents at the end of each visit.

At the March 2009 hearing, the court heard testimony from father regarding his custody request. Father informed the court that he was in successful compliance with his parole requirements. He had new full-time employment for almost four months and had no problems with his employer. He continued to live with his adult sister and her children as well as another child of his and two other sisters. He continued attending a program for fathers on a weekly basis. Father believed it would be in M.'s best interest to be in his custody because "she's my kid and I love her[.]"

Following closing arguments, the court denied father's custody request. Although the court found father's efforts to be admirable, those efforts did not constitute a change of circumstances sufficient to merit reunification. The court added even if circumstances had changed, they did not militate in favor of M.'s best interest.

After hearing additional testimony and argument on permanency planning, the court found M. adoptable and terminated parental rights.

DISCUSSION

I.

Any party may petition the court to modify or set aside a prior dependency order on grounds of changed circumstance or new evidence. (§ 388, subd. (a).) The petitioning party must also show the proposed change is in the best interests of the child. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) Section 388 provides a means for the court to address a legitimate change of circumstances even at the permanency planning stage while protecting a child's need for prompt resolution of his or her custody status. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) Whether the juvenile court *should* modify a previously made order rests within its discretion and its determination may not be disturbed unless there has been a clear abuse of discretion. (*In re Stephanie M., supra*, at p. 318.)

Father contends the court abused its discretion by denying his custody request. In his view, he demonstrated there was a significant change of circumstances since the December 2008 dispositional hearing and that undoing the court's prior order would be in M.'s best interests. Having reviewed the record as summarized above, we conclude the court did not abuse its discretion by denying appellant's section 388 request. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 318.)

Father's successful compliance with his parole conditions and participation in a parenting group as well as his employment and housing are certainly commendable, as the court noted. He was doing all of these things, however, four months earlier when the court denied him reunification services. Consequently, father's showing did not amount to any change of circumstances since the court's December 2008 denial order.

In addition, the court denied father reunification services because there was no clear and convincing evidence reunification would serve M.'s best interest. As the juvenile court found and this court affirmed, father had absented himself from M.'s life by virtue of his criminal behavior such that M. had no relationship with him. Father's efforts to improve himself did not change this fact. He also failed to introduce any evidence that since December 2008 he had developed a relationship with M. At most there was evidence of monthly, supervised one-hour visits that went well. Consequently, there was no legitimate change of circumstances to warrant the court's consideration of whether to modify its previous decision to deny father reunification services. (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 309.) Given the lack of changed circumstances, the court properly could deny father's modification request on that ground alone.

Furthermore, father's profession of love for M. did not warrant a finding that an award of M.'s custody to him would be in the child's best interests. A primary consideration in determining the child's best interests at this late stage is the goal of assuring stability and continuity. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) There was no evidence that an award of M.'s custody to father with whom she had no

relationship, other than biological, would assure the child's stability and continuity of care. Indeed, the opposite could be said.

II.

In her appeal, mother argued she was entitled to this court's review of the court's previous jurisdictional findings and dispositional orders. She also claimed there was insufficient evidence to support the court's adoptability finding. Having reviewed the matter, we determined mother's contentions were meritless.

DISPOSITION

The order terminating parental rights is affirmed.